

Under the Tobacco Products Tax Act of 1995, a tax is imposed upon the last distributor who sells tobacco products to a retailer or consumer in Illinois at the rate of 18% of the wholesale price of tobacco products sold or otherwise disposed of in this State. See 86 Ill. Adm. Code 660.05. (This is a GIL.)

January 31, 2000

Dear Xxxxx:

This General Information Letter, issued pursuant to 2 Ill. Adm. Code 1200 (see enclosed), is in response to your letter dated August 20, 1997. Department rules require that the Department issue only two types of letters, Private Letter Rulings and General Information Letters. The nature of your request and the information you have provided require that we respond with a General Information Letter. A General Information Letter is designed to provide general information, not a specific response to an inquiry. General Information Letters are not binding on the Department, but Private Letter rulings are binding on the Department. See Section 1200.120(b) and (c). We hope that the information in this General Information Letter is sufficient for your purposes. If you determine that a Private Letter Ruling is needed, you will have to provide all of the information required by Section 1200.110(b)(1-8). Specifically, the tax period at issue and the properly executed power of attorney were not included in the request for a Private Letter Ruling. See 2 Ill. Adm. Code 1200.110(b)(3) and (8).

In your letter, you have stated and made inquiry as follows:

This is a request for a Private Letter Ruling made under the Illinois Administrative Code, Title 2, Chapter I, Section 1200.110. This request is on behalf of the above interested party who raises the issue of the applicability of the Illinois Tobacco Products Tax Act of 1995 to its sales occurring in STATE. There is no audit currently being conducted of this Company¹ nor are the issues raised in the letter currently in litigation.

It is represented that to the best of the knowledge of COMPANY and myself, the issues raised herein have not been ruled upon nor previously submitted to the Department for a ruling.

Interested Parties

The above-stated party, COMPANY, is a non-Illinois tobacco company ('Non-Illinois Tobacco Company') which has its principal place of business in STATE. Its address is as follows:

NAME/ADDRESS

The above Company is in the business of selling cigars to distributors and tobacco retailers across the country for purposes of resale. It makes all of its sales from its STATE location and has no office, warehouse or other place of business in Illinois. In addition, this Non-Illinois Tobacco Company has no employees in Illinois, nor does it have any warehousing or storage of inventory in Illinois. Moreover, this Company solicits business in Illinois solely through a single sales representative who takes sales orders and relays them to the STATE office of this Company for approval or rejection.

All products sold to Illinois customers are shipped from outside of Illinois directly to the customers in Illinois. All deliveries of products to Illinois customers occurs by common carrier or U.S. mails. No delivery of products occurs by this Company's trucks, employees or representatives.

Material Facts

All sales by the above Non-Illinois Tobacco Company are consummated in STATE where acceptance or rejection of the sales order is made. This Company's sales representative in Illinois is only authorized to take orders and submit them to the Company for approval. The invoice for the tobacco products sold is then sent directly from this Non-Illinois Tobacco Company to the customer. The customer then pays the Non-Illinois Tobacco Company directly for the tobacco products purchased. The tobacco products are delivered by the Non-Illinois Tobacco Company from locations outside of Illinois into Illinois using common carriers or the mail.

Also, free samples may be sent through the mail by the Non-Illinois Tobacco Company from outside of Illinois for shipment directly to potential or current customers. In addition, the Company may supply a small amount of free samples to its sales representative to be handed out free of charge to potential buyers.

Issues Presented

1. An opinion is requested that the sales of tobacco products by COMPANY, a Non-Illinois Tobacco Company, from its place of business in STATE which are shipped to distributors or retailers in Illinois are not subject to the Illinois Tobacco Products Tax Act of 1995.

2. An opinion is requested that COMPANY, a Non-Illinois Tobacco Company, is not a tobacco products distributor engaged in business in Illinois and, therefore, is not required to register under the Illinois Tobacco Products Tax Act of 1995.

3. An opinion is requested that the tobacco products given away free of charge from STATE which are shipped by common carrier or the mail to potential customers or distributors in Illinois are not subject to the Illinois Tobacco Products Tax Act of 1995.

The Statute

The Illinois Tobacco Products Tax Act of 1995 is an occupation tax on persons engaged in the business of being a distributor of tobacco products in Illinois. Section 143/10-20 of the Act provides that;

'It shall be unlawful for any person to engage in the business as a distributor of tobacco products in this state within the meaning of this Act without first having obtained a license to do so from the department.'

Moreover, the Act only imposes a tax on:

'any person engaged in business as a distributor of tobacco products, as defined in Section 10-5, at the rate of 18% of the wholesale price of tobacco products sold or otherwise disposed of in this state.' Section 143/10-10

The tax goes on to make it clear that a person is engaged in 'business' if that person is involved in:

'any trade, occupation, activity, or enterprise engaged in for the purpose of selling tobacco products in this state.' Section 143/10-5.

Therefore, a person must be engaged in the business of selling tobacco products in Illinois, to be subject to the Tobacco Products Tax Act of 1995.

In addition, only tobacco products sold or otherwise disposed of in Illinois are subject to the tax. Section 143/10-10. A 'sale' is defined in the statute as meaning:

'any transfer, exchange, or barter in any manner or for any means whatsoever for consideration and includes all sales made by persons.' Section 143/10-5.

Consequently, the transfer, exchange, or barter must occur in Illinois for it to be subject to tax. Sales occurring outside of Illinois are specifically excluded from the tax base. This is also consistent with Section 143/10-20 of the Act which provides that,

'it is the duty of the distributor and manufacturer to remit the tax imposed upon the wholesale price of tobacco products sold or otherwise disposed of in this state.'

The Tobacco Products Act likewise provides for a tax when tobacco products are otherwise disposed of in Illinois. While 'otherwise disposed of' is not defined in the statute, the Department's regulations equate the term as meaning give aways or transfers without consideration. 86 Ill. Admin. Code § 660.20c. This is also consistent with a common sense understanding of the term 'otherwise disposed of' which would denote an activity other than a sale, where products are given away or transferred free of charge. Such give aways normally occur at the point that the products are actually given as a gift. The Department has previously recognized that gifts of items occur at the point the grantor deposits the item in the mail or places the item with the common carrier for delivery into Illinois. PLR 94-0191 (June 13, 1994); See also Miller Brewing Co. v. Whitley, 91 L 50465 (order entered 5/28/92).

Lastly, the term 'distributor' is defined in the Act to include certain manufacturers or wholesalers,

'located outside of Illinois engaged in the business of selling tobacco products who sells, exchanges, distributes, ships, or transports tobacco products to retailers or consumers in this state, so long as the manufacturer or wholesaler has or maintains within the state, directly or by a subsidiary, an office, sales house, or other place of business, or any agent or other representative operating within the state under the authority of the person or subsidiary, irrespective of whether the place of business or agent or other representative is located here permanently or temporarily.' Section 142/10-5.

This definition is restricted to wholesalers or manufacturers engaged in 'business', which is defined in the Act as engaging in a trade, occupation or activity engaged in for the purposes of 'selling tobacco products in this state. Consequently, only those out-of-state manufacturers or wholesalers who have an office, place of business, subsidiary, representative or agent in Illinois *consummating sales* in Illinois on its behalf are distributors under the Act.

Analysis

In Illinois, tax statutes are strictly construed against taxation. Van's Materials Company, Inc. v. Department of Revenue, 131 Ill. 2d 196 (1989). 'In cases of doubt they are construed most strongly against the government and in favor of the taxpayer.' Id. at 202.

The Tobacco Products Tax Act of 1995, like the Cigarette Tax Act, the Retailers' Occupation Tax Act, and the Motor Fuel Tax Act, is an occupation tax. It is imposed on the occupation of engaging in the

business of being a distributor of tobacco products in Illinois. The Act expressly limits its application to distributors engaged in the business of selling tobacco products in Illinois. Section 143/10-5 (definition of 'business'); Section 143/10-10-20 (license provision and remittance provisions of Act). Moreover, the Act makes it clear that sales of tobacco products subject to tax is restricted to those tobacco products sold in Illinois, while tobacco products sold outside of Illinois are not subject to the tax. Section 143/10-10. This appears to be the plain and common sense reading of the Tobacco Products Tax Act and is also consonant with the Department's interpretation of the other occupation taxes mentioned above. Moreover, this interpretation is consistent with long standing case law in Illinois. See Standard Oil Company v. Department of Revenue, 383 Ill. 136 (1943); Ex-Cell-O Corporation v. McKibbin, 383 Ill. 316 (1943); Norton Company v. Department of Revenue, 340 U.S. 534 (1951); Johnson v. Daley, 403 Ill. 338 (1949); The Ohio Oil Company v. Wright, 386 Ill. 206 (1944).

Both the U.S. and Illinois Supreme Court have emphasized that an occupation tax (such as the Tobacco Products Tax Act) can only be imposed upon those persons actually engaged in the business of selling products in Illinois. A person engaged in business outside of Illinois who merely solicits orders in, and ships products to, Illinois is not engaged in business in Illinois as that term is commonly understood under Illinois law. See Ex-Cell-O Corporation v. McKibbin, 383 Ill. 316 (1943); Standard Oil Company v. Department of Revenue, 383 Ill. 136 (1943); Norton Company v. Department of Revenue, 340 U.S. 534 (1951). Significantly, even the Department's regulations under the Illinois Retailers' Occupation Tax Act recognize and reiterate this basic understanding of Illinois law.³ 86 Ill. Admin. Code § 130.610(d) (1).

In the same regard, the definition of 'distributor' in the Act likewise uses the term 'engage in the business' to limit its scope. As previously indicated, 'business' is defined to mean a person engaged in a trade or occupation for purposes of *selling tobacco products in Illinois*. Section 142/10-5. Accordingly, the term 'distributor' is limited to wholesalers or manufacturers engaging in the business of selling tobacco products in Illinois. This interpretation is consistent with the rest of the Act and Illinois law on statutory construction which requires that statutes be read as a whole, with all relevant parts considered. Kraft, Inc. v. Edgar, 138 Ill. 2d 178 (1990).

Even if the definition of 'distributor' was read without the expressed use of the defined word 'business,' it could not legally be interpreted to include taxing non-Illinois sellers on their sales which take place outside of Illinois. Ex-Cell-O Corporation v. McKibbin, 383 Ill. 316 (1943). See also Norton Company v. Department of Revenue, 340 U.S. 534 (1951). Clearly, the term 'distributor'

could not be interpreted so expansively to include manufacturers or wholesalers who are not engaged in the occupation of selling tobacco products in Illinois, since such an interpretation would be unconstitutional. For example, in Johnson v. Daley, supra, the Illinois legislature attempted to expand the Cigarette Tax Act by broadening the definition of 'distributor' to include persons who bring or cause to be brought into Illinois a certain number of cigarettes. The Illinois Supreme Court found this to be a violation of the Illinois Constitution because it included persons not engaged in the business of selling cigarettes in Illinois. Id., at 341; See also, The Ohio Oil Company v. Wright, supra. More fundamentally, under the United States Constitution, a state cannot tax sales made outside of its borders. McLeod v. Dillworth Company, 322 U.S. 327 (1943). Therefore, Illinois could not have legally passed an occupation tax which imposes a tax on sales made outside of Illinois by non-Illinois distributors.

Lastly, the Tobacco Products Tax is restricted to tobacco products 'sold or otherwise disposed of 'in Illinois.' A sale is defined in the Act as the transfer, exchange or barter for consideration. With respect to sales by COMPANY, a Non-Illinois Tobacco Company, its sales occur when the orders are consummated and shipped in STATE. Therefore, none of these sales are occurring in Illinois. This is also consistent with the Illinois Uniform Commercial Code which provides that 'title passes to the buyer at the time and place of shipment,' unless the contract provides otherwise. 810 ILCS 5/2-401(2) (a). Similarly, any items given away free of charge through the mails would be considered as gifts consummated outside of Illinois in STATE. These gifts would have been completed upon delivery to the post office or common carrier for shipment to the customer. Consequently, even if the tax was interpreted as applying to distributors outside of Illinois who engaged in no selling of tobacco products in Illinois, because the tax is still limited to tobacco products *sold or otherwise disposed of* in Illinois, no tax would be due on these transactions occurring in STATE.

Conclusion

Based upon the actual working of the Tobacco Products Tax Act, the Department's consistent interpretation of other Illinois occupation taxes, the case law in Illinois, and U.S. Supreme Court decisions, it is our understanding that a Non-Illinois Tobacco Company, such as COMPANY, would not be subject to the Tobacco Products Tax Act of 1995. Moreover, discussions with certain persons with the Department's Audit Bureau have suggested to us that our understanding of this law is correct. Therefore, we ask that you supply us with an opinion confirming our understanding of the issues raised in this letter. If you disagree with any portion of our analysis or have any questions, we request a conference concerning this matter before a ruling is issued.

Thank you for your time and effort in this matter.

We apologize for the delay in responding to this ruling request and the two similar requests on behalf of COMPANY2 and COMPANY3. As you know, we met on February 5, 1998, to discuss these inquiries; however, at that time, the Tobacco Products Tax Act of 1995 was being challenged in *Arangold Corporation v. Zehnder, et al.*, 718 N.E.2d 191, 240 Ill.Dec. 710 (1999). In July 1999, the Illinois Supreme Court held that Public Act 89-21, which enacted the Tobacco Products Tax Act of 1995, does not violate the single subject rule and remanded the case back to the Circuit Court of Cook County for further proceedings consistent with its opinion. *Goldman v. Zehnder*, (No. 98-L-50203), which addresses issues similar to those in *Arangold*, is currently pending in the Circuit Court of Cook County and, and we are awaiting the result in this case.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you wish to obtain a Private Letter Ruling regarding this factual situation, you will be required to submit all of the information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 with your request.

Very truly yours,

Gina Roccaforte
Associate Counsel

GR:msk
Enc.

¹ An audit was initially scheduled but cancelled by the audit division.

² This is very similar to the definition of "Serviceman" in the Service Occupation Act which on its face appears very broad but when read with the rest of the Act is limited to Servicemen engaged in business of making sales in Illinois.

³ The Illinois Tobacco Products Tax Act incorporates by reference many of the provisions of the ROT, including many provisions dealing with keeping records and liability for the tax.

⁴ See footnote 2 for a comparison of the Service Occupation Tax Act.